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IN THE
COURT OF APPEALS OF INDIANA

SCOTT HASHBERGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0612-CV-599
	)	
GALLOWAY MORTGAGE SERVICES, INC.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-0609-PL-50

July 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Scott Hashberger ("Hashberger") appeals the trial court's Order on Request for Preliminary Injunction, prohibiting him from working for his wife to serve any clients of Galloway Mortgage Services, Inc. ("Galloway"). We affirm.

Issues

As an initial matter, we raise sua sponte whether the trial court had jurisdiction to amend its Order on Request for Preliminary Injunction after this Court had acquired jurisdiction of the appeal. Hashberger raises two issues on appeal, which we consolidate and re-state as: whether the trial court abused its discretion in granting Galloway's Motion for Preliminary Injunction.

Facts and Procedural History

The following are the facts most favorable to the judgment. Hashberger had experience in working as a police officer and delivery driver. Meanwhile, Galloway provided two services, namely home inspections and preservation work, to companies managing abandoned homes. Inspections involved simply reporting the exterior and/or interior condition of a home, while preservation work included preparing an abandoned home for winter, changing locks, and boarding windows, among other things. The great majority of Galloway's revenues derived from preserving properties, but performing inspections was the means by which Galloway secured the more lucrative work. Hashberger had little, if any, knowledge of Galloway's business. In late 2004, Galloway retained Hashberger's services

and designated him an independent contractor for tax purposes.[1]

Soon after, Hashberger and Galloway entered a Noncompete Agreement ("Agreement"), drafted by Jaye Galloway, a shareholder with operational duties at Galloway.[2] The Agreement provided as follows:

> **Employees:**
> Nondisclosure and Noncompetition. (a) At all times while this agreement is in force and after its expiration or termination, the Employee agrees to refrain from disclosing [Galloway] client lists, trade secrets, or other confidential material and information. The Employee agrees to take reasonable security measures to prevent accidental disclosure.
>
> (b) For purposes of this covenant not to compete, competition is defined as soliciting or accepting employment by, or rendering professional services to, any person or organization that is or was a client of [Galloway] during the term of the employee's/subcontractor's employment. At no time should subcontractors be in contact with [Galloway's] clients, companies, or individuals directly associated with our clients.
>
> (c) Employee shall not own, manage, operate, consult or [sic] to be employed in a business substantially similar to, or competitive with, the present business of [Galloway] or such other business activity in which [Galloway] may substantially engage during the term of employment.
>
> (d) After expiration or termination of this agreement, except in the case of a termination by [Galloway] in violation of the terms of this agreement, the Employee agrees not to set up in business as a direct competitor of [Galloway] within any county that [Galloway] services, for a period of three years following the expiration or termination of this agreement.
>
> **Contractors:**
> If you are employed by [Galloway] as an independent contractor (subcontractor), items (c) and (d) are exempt from agreement and item (b) is

[1] Both Hashberger and Jaye Galloway stated that Hashberger was an independent contractor. However, contrary to the arguments of both parties, the trial court explicitly declined to find whether Hashberger was an employee or independent contractor.

[2] Jaye Galloway was not an attorney.

> amended for all clients that the independent contractor is already under contract or in business with at the date of signature.

Appendix at 26. Both parties signed the Agreement.[3] Above Hashberger's signature block appeared two boxes, for purposes of designating whether he was an employee or an independent contractor. No mark appeared on either box. On five lines provided for him to specify his "list of current clients," no marks appeared. Id.

Jaye Galloway testified that, in July of 2005, Hashberger asked her to make his checks payable to his wife, Kacey Hashberger ("Kacey").[4] At approximately the same time, Kacey began doing some of the inspections Galloway assigned to Hashberger. In January of 2006, Kacey established a business and competed with Galloway.[5] In February of 2006, Hashberger left Galloway. He began and continues to work for Kacey, but he has not taken compensation.

When Hashberger was assisting Galloway, he performed work for a number of its customers, including Safeguard, which alone accounted for more than half of Galloway's revenues. Galloway was receiving significantly less work from Safeguard in 2006 than it had in 2005. In July of 2006, Galloway received a copy of an email from Safeguard to "Kacey or Scott," referencing payment for a final inspection. Plaintiff's Exhibit 2. Based upon that email and another, Galloway concluded that Hashberger and Kacey were competing against Galloway for Safeguard's business, and that the competition was having a "devastating

[3] Both signatures were dated December 10, 2004. From the record, however, it appears that Galloway's representative did not sign until 2006.

[4] The trial court concluded that Hashberger made this request in light of litigation regarding his child support payments.

effect" on Galloway's business. App. at 155.

In September of 2006, Galloway filed a Verified Complaint and Motion for Temporary Restraining Order without Notice and for Preliminary Injunction against Hashberger. After conducting three hearings, the trial court issued an Order on Request for Preliminary Injunction ("Order"). The Order provided for the entry of a preliminary injunction upon Galloway's securing a bond of $25,000. The bond was filed on December 18, 2006. The same day, the CCS reflects entry of the Preliminary Injunction, prohibiting Hashberger "from working for Kacey Hashberger in any capacity that relates to her competing against Galloway by providing inspection or preservation services to any of Galloway's customers." App. at 23. Four days prior, Hashberger had filed his Notice of Appeal.

The clerk issued its Notice of Completion of Clerk's Record on January 12, 2007. On February 16, 2007, the trial court issued an Order on Motion for Clarification ("Clarification"), purportedly amending its Order.

Discussion and Decision

I. Whether the Trial Court Had Jurisdiction to Amend Appealed Order

As an initial matter, we note sua sponte that the trial court's Clarification amended substantively the earlier Order. The Order's prohibition was limited to assisting Kacey in competing against Galloway, and contained no geographic or temporal limitations. In contrast, the Clarification prohibited Hashberger from assisting anyone in competing for Galloway's clients, but was constrained to certain counties and lasted only three years. The

[5] Kacey did not enter a non-compete agreement with Galloway.

Clarification, however, was issued a month after the clerk issued its Notice of Completion of Clerk's Record ("Notice").

Indiana Appellate Rule 8 provides that this Court acquired jurisdiction the day that the clerk filed its Notice. Case law applying this rule and its predecessor establishes clearly that the trial court lacked jurisdiction to alter or amend its decision, thereby making the Clarification void. Coulson v. Ind. & Mich. Elec. Co., 471 N.E.2d 278, 279 (Ind. 1984); In re Marriage of Bartley, 712 N.E.2d 537, 547 (Ind. Ct. App. 1999) (holding that clarification of earlier order was void when issued after the appellate court acquired jurisdiction). In Coulson, our Supreme Court reasoned that "[t]he purpose of viewing jurisdiction in this formalistic manner is to facilitate '. . . the orderly presentation and disposition of appeals and [prevent] the confusing and awkward situation of having the trial and appellate courts simultaneously reviewing the correctness of the judgment.'" Coulson, 471 N.E.2d at 279 (quoting Donahue v. Watson, 413 N.E.2d 974, 976 (Ind. Ct. App. 1980)).[6] Therefore, we review only the Order of December 6, 2006.

II. Whether the Trial Court Erred in Granting Motion for Preliminary Injunction

The following is the standard by which we review a trial court's consideration of a motion for preliminary injunction regarding the enforcement of a non-compete agreement.

> The decision whether to grant or deny a preliminary injunction rests within the discretion of the trial court, and the scope of appellate review is limited to deciding whether the trial court has clearly abused its discretion. An abuse of discretion occurs when the trial court's decision is clearly against the

[6] The parties do not raise this issue and make little reference to the Clarification. Hashberger essentially ignores the Clarification, describing this as an appeal of the trial court's Order of December 6, 2006, attaching only the Order to his brief, and confining his argument to the Order. His only reference to the Clarification is in his Statement of the Case. Meanwhile, Galloway makes no mention of the Clarification.

> logic and effect of the facts and circumstances or if the trial court misinterprets the law. When determining whether or not to grant a preliminary injunction, the trial court is required to make special findings of fact and conclusions of law. When findings and conclusions of law are made, the reviewing court must determine if the trial court's findings support the judgment. We will reverse the trial court's judgment only when it is clearly erroneous. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. We will consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment.
>
> The trial court's discretion to grant or deny a preliminary injunction is measured by several factors: (1) whether the plaintiff's remedies at law are inadequate, thus causing irreparable harm pending the resolution of the substantive action if the injunction does not issue; (2) whether the plaintiff has demonstrated at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) whether the threatened injury to the plaintiff outweighs the threatened harm the grant of the injunction may inflict on the defendant; and (4) whether, by the grant of the preliminary injunction, the public interest would be disserved.
>
> The moving party has the burden of showing, by a preponderance of the evidence, that the facts and circumstances entitle him or her to injunctive relief. The power to issue a preliminary injunction should be used sparingly, and such relief should not be granted except in rare instances where the law and facts are clearly in the moving party's favor.

Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc., 820 N.E.2d 158, 163 (Ind. Ct. App. 2005) (internal quotations and citations omitted), reh'g denied, trans. denied.

On appeal, Hashberger argues that: (1) the Agreement was not enforceable, and (2) the trial court clearly erred in making certain findings regarding Galloway's claim. Both of these arguments contest a single factor of the four to be assessed in considering a motion for preliminary injunction: whether the plaintiff has demonstrated at least a reasonable likelihood of success at trial by establishing a prima facie case.

A. Enforceability of the Non-Compete Agreement

1. Standard of Review and Applicable Law

Hashberger argues that the Agreement was not enforceable. Indiana contract law provides that construction of the terms of a written contract is a pure question of law, to be reviewed de novo. Harrison v. Thomas, 761 N.E.2d 816, 818 (Ind. 2002), trans. denied. Unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning. Shorter v. Shorter, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006). Clear and unambiguous terms in the contract are deemed conclusive, and when they are present we will not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions. Id.

A document is not ambiguous merely because the parties disagree about a term's meaning. Univ. of S. Ind. Found. v. Baker, 843 N.E.2d 528, 532 (Ind. 2006). A contract will be found ambiguous only if reasonable persons would differ as to the meaning of its terms. Beam v. Wausau Ins. Co., 765 N.E.2d 524, 528 (Ind. 2002), reh'g denied. An ambiguous contract will be construed against its drafter, especially where that drafter seeks to enforce a non-compete agreement. Fresh Cut, Inc. v. Fazli, 650 N.E.2d 1126, 1132 (Ind. 1995); Oxford Fin. Group, Ltd. v. Evans, 795 N.E.2d 1135, 1143 (Ind. Ct. App. 2003). If the terms of a written contract are ambiguous, it is the responsibility of the trier-of-fact to ascertain the facts necessary to construe the contract. Pinkowski v. Calumet Twp., 852 N.E.2d 971, 981 (Ind. Ct. App. 2006), trans. denied. If a contract is ambiguous, extrinsic circumstances and rules of contract construction may be employed to help construe the contract and ascertain the intent of the parties. Id.

2. Applicability of Agreement to Hashberger

Hashberger asserts that he was an independent contractor. Further, he argues that the fifth and final paragraph exempted independent contractors from the restraints in the third and fourth paragraphs. The trial court determined that this term was ambiguous, but interpreted it within the context of the sentence and the entire Agreement, concluding that the exemption applied only where a person entering the Agreement had pre-existing client relationships. In so concluding, the trial court relied on Hashberger's admissions that he considered himself bound by the Agreement. When asked by the trial court what the Agreement meant, Hashberger testified that "[i]t meant that I would not do inspections for another company after I left Galloway." App. at 380. The trial court found that the parties intended "to execute a valid noncompete restricting Hashberger from competing against Galloway [in inspection or preservation work] upon his leaving Galloway's employ." Id. at 11. In light of his acknowledgement that he felt bound by the Agreement, the trial court did not err in concluding that the Agreement applied to Hashberger.

3. Reasonableness of Constraint

Hashberger challenges the Agreement as containing unreasonable restraints on trade.

Non-compete agreements are not favored in the law. Dicen v. New Sesco, Inc., 839 N.E.2d 684, 687 (Ind. 2005). Such agreements are enforced where they are reasonable in terms of time, geography, and the activity prohibited. Id. at 687, 688. Whether a non-compete agreement is reasonable is a question of law. Smart Corp. v. Grider, 650 N.E.2d 80, 83 (Ind. Ct. App. 1995), trans. denied. When reviewing non-compete agreements, Indiana courts have historically enforced reasonable restrictions, but struck unreasonable restrictions,

granted they are divisible. Dicen, 839 N.E.2d at 687. This principle is better known as the blue-pencil doctrine. Id.

Specifically, Hashberger challenges the second, third and fourth paragraphs as "overly broad." Appellant's Brief at 13. As an initial matter, we note that Hashberger does not contest that the first paragraph, prohibiting the disclosure of Galloway's "clients lists, trade secrets, or other confidential material and information," is reasonable. Id. at 26.

Meanwhile, the third paragraph applies only "during the term of employment." Id. The Order, however, constrains merely Hashberger's future conduct. It is undisputed that Hashberger no longer provides services to Galloway. Accordingly, the third paragraph is irrelevant to our consideration of the Order.[7]

The second paragraph, the broadest of the Agreement, prohibits subcontractors from being "in contact with [Galloway's] clients, companies, or individuals directly associated with our clients." Id. It does not limit the time or geography of this constraint. In Dicen v. New Sesco, Inc., our Supreme Court refused to enforce a restraint "from working in the land remediation business anywhere in the United States for two years after [Dicen] left New Sesco." Dicen, 839 N.E.2d at 689. The Dicen Court, declining to use the blue-pencil doctrine because the striking of the geographic term would simply result in no geographic limitation at all, held the restraint unenforceable. Accordingly, we conclude that the restraint in the second paragraph is not enforceable.

In contrast, the fourth paragraph prohibits an employee from setting "up in business as

[7] That does not mean that violation of the first paragraph would be irrelevant to consideration of Galloway's Verified Complaint.

a direct competitor of [Galloway] within any county that [Galloway] services, for a period of three years." App. at 26. The trial court concluded that this was reasonable in time, geography, and prohibited activity. In a heading of his brief, Hashberger asserts that the fourth paragraph was not enforceable. In the text under that heading, however, Hashberger states merely that he did not violate that paragraph. There is a difference. He makes no cogent argument that the fourth paragraph is unenforceable. Accordingly, he has waived any contest to the reasonableness of that term. See Cooper v. State, 854 N.E.2d 831, 842 (Ind. 2006) (holding that argument was waived where it was supported neither by cogent argument nor citation to authority). The restraint in the fourth paragraph was enforceable.

Factually, Hashberger asserts that "the trial court did not find that [he] set up his own business," emphasizing that his wife's business was competing with Galloway. Appellant's Brief at 22. To the contrary, the trial court found that Kacey "began competing against Galloway and with Hashberger's help solicited [Safeguard]," that Hashberger "began to predominantly work for Kacey Hashberger in competing against Galloway," that Kacey does not pay for his services, and that "Hashberger's working for Kacey Hashberger amounts to assisting a company that is in direct competition with Galloway." App. at 12, 13. Based upon the evidence, the trial court did not clearly err in making these determinations.

B. Evidence Supported the Findings

Finally, Hashberger argues that the trial court clearly erred in finding that: (1) Hashberger was an employee, (2) Hashberger gave Kacey information to start her business, (3) Galloway had a protectible interest in its goodwill, and (4) Galloway suffered a monetary loss as a result of Kacey's business.

As to the first contention, however, the trial court in fact declined "to make a precise determination as to what was the parties' legal relationship." App. at 19. As noted supra, the trial court relied on Hashberger's admissions, not upon a determination of his status as an employee or an independent contractor, in concluding that he was bound by the Agreement.

Hashberger argues that there is no evidence to support the trial court's finding that Hashberger gave information to Kacey, noting her service to Galloway. However, Jaye Galloway testified that Galloway trained Hashberger in the performance of inspections and "what to look for while he was performing the interior inspections regarding the preservation side of [Galloway]." App. at 238 (emphasis). Further, she testified that while Hashberger and Kacey performed some Galloway inspections as a team, she always dealt with Hashberger and only met Kacey on one occasion. There is evidence to support the trial court's conclusion that Hashberger shared confidential information with Kacey.

Hashberger alleges that Galloway lacked a protectible interest in the goodwill of its business because the work was not complex. The trial court found that Galloway did enjoy a protectible interest in its relationships with its customers and in having learned their procedures and how to meet their expectations. There is ample evidence in Jaye Galloway's testimony that Galloway had a protectible interest in the goodwill of the business.

Finally, Hashberger denied that there was any evidence to support the trial court's finding that Galloway's losses were due to competition from Kacey. Basing its calculation on data of Galloway's revenue from Safeguard in 2005 and comparing that to the same data for the first eight months of 2006, the trial court found that Galloway was experiencing a thirty-two percent reduction in revenue from Safeguard. Meanwhile, Kacey testified that she

started her business in January of 2006 and that she was providing services to Safeguard. We conclude that the trial court did not clearly err in making any of the three contested findings. Furthermore, the trial court did not abuse its discretion in concluding that Galloway demonstrated at least a reasonable likelihood of success at trial by establishing a prima facie case.

Conclusion

The trial court lacked jurisdiction to amend its Order from which appeal had already been sought. In issuing that Order, the trial court did not abuse its discretion in granting Galloway's Motion for Preliminary Injunction.

Affirmed.

SHARPNACK, J., and MAY, J., concur.